IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21-9-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE R. SUDHAKAR

H.C.P.NO.408 OF 2007

Sheetal
D/o Jagadesh .. Petitioner

Vs.

1. State of Tamil Nadu,
   Rep. by the Superintendent
   of Central Prison,
   Vellore.

2. The Superintendent of Central Prison,
   Puzhal, Chennai.

3. The Inspector of Police,
   Vellavedu Police Station,
   Chennai. .. Respondents

Habeas Corpus Petition filed under Article 226 of the Constitution of India for directing the respondents to produce the detenues (1) Jagadesh, Son of Ranjit Singh (2) Om Prakash, Son of Ranjot Singh (3) Zaildarsingh, Son of Jagmal Singh (4) Ravindersingh, Son of Premasingh (5) Rakesh, Son of Ramupal (6) Lakshman, Son of Kari and (7) Babulu, Son of Kishnanlal, before this Court and set them at liberty.

For Petitioner : Mr.R. Sankara Subbu

For Respondents : Mr.M. Babu Muthu Meeran
Addl. Public Prosecutor

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O R D E R

(Order of the Court was made by R. SUDHAKAR, J.)

This Habeas Corpus Petition has been filed by one Sheetal, daughter of one of the detenues, namely, Jagadesh, for and on behalf of her father and the following other detenues, namely, (1) Om Prakash, Son of Ranjot Singh (2) Zaildarsingh, Son of Jagmal Singh (3) Ravindersingh, Son of Premasingh (4) Rakesh, Son of Ramupal (5) Lakshman, Son of Kari and (6) Babulu, Son of Kishnanlal.

2. According to the petitioner, all the above said persons were arrested and remanded to judicial custody in Crime No.451 of 2004, on the file of Velaveu Police Station, for offences under Sections 395, 397, 120-B r/w.27(2) of the Arms Act. It is stated in the petition that they were produced periodically before Tiruvallur Sessions Court and on 16.3.2007 they were not produced before the said Court. Therefore, the present Habeas Corpus Petition has been filed stating that detention beyond 16.3.2007 of the above said seven persons is illegal and violative of Article 21 of the Constitution and Section 309 of the Criminal Procedure Code and therefore, they should be set at liberty.

3. At the time of admission, i.e., on 28.3.2007, based on the submissions made by the Additional Public Prosecutor, it has been recorded that the detenues were produced before Judicial Magistrate No.III, Vellore on 16.3.2007 and remand was extended upto 30.3.2007.

4. The only contention raised by the learned counsel for the petitioner is that the Judicial Magistrate, who extended the remand on 16.3.2007, has no jurisdiction to extend the remand and, therefore, the order extending the remand is illegal.

5. Learned Addl. Public Prosecutor has produced a copy of the wireless message, dated 16.3.2007, from the Superintendent, Central Prison, Vellore, addressed to the Principal Sessions Court, Tiruvallur District, which reads as follows :-

> "I submit that the following convict & remand prisoners concerned in P.R.C.No.40/2005 and Vellavedu Police Station Crime No.451/2002 are to be produced before Hon'ble Court on 16.3.07. Due to Hon'ble Chief Minister of Tamilnadu visit to Tiruvannamalai District entire police personnel engaged for bando bust duty escort not provided by the Armed Reserve, Vellore District from 16.03.2007 & 17.03.2007. Hence the above prisoner not able to produced before Hon'ble Court on

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16.03.2007.

The Chief Judicial Magistrate, Vellore vide proceeding No.1073/2007/HC, dated: 16.03.07 Judicial Magistrate, Vellore nominated to extend the remand period."

6. Subsequently, a report dated 13.9.2007 is filed by the Inspector of Police, B-7 Vellavedu Police Station, Tiruvallur and it states as follows :-

"3. It is submitted that based on the complaint a case in Crime No.451/04 was registered for offence under sections 395 & 397 I.P.C. During the course of investigation, the main accused Oma Bawaria @ Omprakash was arrested by the Inspector of Police, Sriperumpudur Police Station in connection with the Crime No.352/2004 under sections 302, 307, 397 I.P.C. On 8.9.05. On his confession it is came to light of his involvement in this case. Investigation disclose that A-1 Omprakash and his associates involved in 24 cases in similar nature and committed dacoity to the property worth more than a Crore apart from causing injuries to 64 peoples.

4. It is humbly submitted that the investigation reveals that 33 persons has been involved in the above said crime and out of which 11 persons arrested and remanded to judicial custody.

5. It is further submitted that after completion of investigation final report has been filed on 16.5.2005 before the learned Judicial Magistrate No.II, Poonamallee for offence under sections 395 & 397 I.P.C. read with 120 B I.P.C. And 109 I.P.C and 27(2) Arms Act and the same has been taken on file by the learned Judicial Magistrate No.II, Poonnamallee in P.R.C.No.40/2005 on 05.07.2005.

6. It is respectfully submitted that the case has been committed to the learned District Judge, Thiruvellur so far, 10 accused are concerned. The other accused has been splited up and the same has been pending in P.R.C.No.10/2007 before the learned Judicial Magistrate II, Poonamallee. The Learned District Judge Thiruvallur taken the

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> case on file in S.C.11/2007 and the same was posted on 16.3.2007 for appearance of the accused. Due to the Honourable Chief Minister of Tamil Nadu Bundobust duty, the Escort Police has not been available to produce the accused before the District Sessions Judge, Thiruvallur. Hence on 16.3.2007 as per the requisition of Superintendent, Central Prison, Vellore, the learned Judicial Magistrate No.III, Vellore went to Central Prison, Vellore and extended the remand from 16.3.2007 to 30.3.2007. On 30.3.2007 the accused were produced before the learned Principal District Judge, Thiruvallur and the remand has been extended till 10.4.2007. Subsequently the accused produced and remand extended periodically upto 26.7.2007 and the case was made over to learned Assistant Sessions Judge, Poonamallee and the accused was directed to be produced before the learned Assistant Sessions Judge, Poonamalee on 14.8.2007. All the accused persons were produced before Assistant Sessions Judge, Poonamallee on 14.8.07 and their remand was extended upto 18.9.2007."

7. Learned counsel appearing for the petitioner in support of his contention by placing reliance upon the decision of the Supreme Court reported in 2002 SCC (Cri) 62 (STATE OF TAMIL NADU v. PARAMASIVA PANDIAN), confirming the Division Bench decision of this Court in HCP.Nos.1401 to 1403 of 2000 dated 28.9.2000 and stated that the order dated 16.3.2007 passed by the Magistrate extending the remand is illegal and without jurisdiction.

8. In the above stated case the accused were charged for offences under the Tamil Nadu Essential Trade Articles (Regulation of Trade) Order, 1984 read with Section 7(1)(a)(ii) of the Essential Commodities Act, 1955. They were initially produced before the Area Magistrate who remanded them to police custody and thereafter the Special Court at Madurai extended the orders of remand periodically. The stand taken by the accused before the High Court as has been dealt with in para 7 of the Apex Court judgment is as hereunder :-

> "7. The three accused persons filed Habeas Corpus Petitions Nos.1401, 1402 and 1403 of 2000 in the High Court of Madras challenging the validity of the remand orders passed by the Special Court at Madurai and questioned the legality of their detention in pursuance of the said order of remand. The case of the petitioners shortly stated was that after the EC (Special

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Provisions) Act, 1981 lapsed by efflux of time in 1998, the Special Court constituted under Section 12-A of the said Act ceased to have jurisdiction to try cases under the EC Act, and therefore, the remand orders passed by the Special Court constituted for trial of cases under the NDPS Act had no jurisdiction to pass remand order in the EC Act cases. Thus the successive orders of remand passed by the Special Court under the NDPS Act at Madurai being without jurisdiction were invalid and the detention of the petitioners on the basis of such orders was illegal. The petitioners prayed for being released from custody forthwith."

(Emphasis supplied)

The conclusion of the Division Bench of the Madras High Court in Paramasiva Pandian's case on the above stated factual background is extracted in para 10 of the Apex Court judgment, which is to the following effect :-

"10. The High Court summed up its findings in the following words:

"But in this case as already pointed out it is clear that neither on the date of first remand nor on the date of subsequent extension, or of taking cognizance, nor as on date there is legal order of remand or extension of remand at all by the Special Court for Essential Commodities Act cases, Madurai which ceased to exist long ago and as it is not a validly constituted court or Magistrate its orders and proceedings are without jurisdiction. Hence, the reliance placed upon the above pronouncement is of no consequence or assistance, nor it could be considered as a mere irregularity as sought to be made out.

In the foregoing circumstances the order of remand and the extension of the remand of the detenus from time to time are without jurisdiction, such order cannot be continued and there should naturally be a direction to the

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respondent herein as well as the Superintendent of the jails concerned, namely, Central Jail, Vellore, Central Jail, Palayamkottai, Central Jail, Trichirapalli, to set the three detenus at liberty.

Though the detenus as already held are in remand which remand is being without jurisdiction, ordinarily the detenus should be set at liberty. However, in the interest of justice and on the facts in the case instead of setting the detenus at liberty and thereafter allowing the respondent to go before the Magistrate concerned to avoid delay and technical objections and to render substantial justice, we hold that this is imminently a fit case where this Court would be justified in enlarging the detenus on bail as in two cases initially there was a valid order of remand by the Area Magistrate and in the third case even though there was no remand by the Area Magistrate and the remand was made by the Special Court at the first instance. But on that score it would not be proper for us to treat the third case as differently and to give a disposal differently." (emphasis supplied)

9. While upholding the order of the High Court, the Apex Could held that the Special Court constituted for trial of NDPS Act cases at Madurai did not have the power to extend the remand of an accused under the provisions of the Essential Commodities Act. In para 17, the Apex Court held as follows :-

"17. Coming to the question whether the Special Court constituted for trial of cases under the NDPS Act could exercise the power of remand of an accused in the EC Act case, which it was doing when the Special Court constituted for the EC Act cases was in existence, the answer to the question is in the negative, for the simple reason that the Special Court constituted for the NDPS Act cases is a court of exclusive jurisdiction for trial of the particular class of cases provided under the NDPS Act and it has not been vested with power of

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> a Judicial Magistrate for the purpose of dealing with the EC Act cases. To accept the contention raised on behalf of the appellant in this regard would in our view be contrary to the scheme of things under the Criminal Procedure Code which specifically vests the power of remand under Section 167 in a Judicial Magistrate. The High Curt was, therefore, right in negativing the contention raised on behalf of the State Government in this regard. It is relevant to note here that even after holding that the remand orders were passed by the court not competent to pass such orders, the High Court has not granted the prayer of the writ petitioners for their release but has only ordered their release on conditions as noted in the judgment."

The Apex Court, however, upheld the order of the High Court directing the release of the accused on bail while refusing to interfere with the detention in the Habeas Corpus Petitions filed.

10. Learned counsel for the petitioner has relied upon the Division Bench decisions of this Court including the decision reported in 1983 L.W. (Crl.) 121 (ELUMALAI v. STATE OF TAMIL NADU, REP. BY THE INSPECTOR OF POLICE, E-3 POLICE STATION, TEYNAMPET, MADRAS AND 2 OTHERS) and contended that the order extending the remand is illegal and has to be interfered with.

11. In the aforesaid case, a large number of accused were deprived of their Constitutional right by orders of Magistrates mechanically extending the remand from time to time. Paras 35 and 42, which are relevant, read as follows :-

> "35. It is very alarming to note that a huge number of prisoners arrested under S.41(1) or S.151(1) or arrested in connection with penal offences coming under various enactments are kept in jail custody under the periodical orders of extension of remand passed by the Magistrates - in many cases even without the production of the prisoners - but also the commencement of the inquiry or trial is delayed or such an inquiry or trial is prolonged and consequent upon the failure of the speedy inquiry or trial, the accused persons are kept in cellular confinements behind the bars for months together, and especially persons who are poor, have no other option except to spend their lives in jail-custody. This kind of situation came for serious comments by the

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Supreme Court in a number of cases Yet, this sorry state of affairs has not come to an end."

"43. In view of all the above discussions, we make the following propositions :

(1) S.167(2) of the Code would apply to arrests made under S.41(1) and in exceptional circumstances, to arrests made under S.151(1). But the Judicial Magistrates, while remanding or passing extensions of remands, should be very watchful to see that the liberty of a citizen is not violated by the police arbitrarily and unreasonably.

(2) S.167(2) is not at all applicable to arrests made under S.41(2) of the Code and as such no court can order remand or extension of remand of persons arrested under S.41(2).

(3) The Courts should not mechanically pass orders of remand without verifying the entries in the diaries and satisfying themselves about the real necessity for granting the remand or extension of remand.

(4) Under no circumstance a Magistrate can order the detention of any person in custody or extend such detention without the production of the accused before him in violation of the provisions of the Code, viz., proviso (b) to S.167 (2), whatever may be the reason stated by the authorities concerned for the non-production of the accused before the Court, such as the non-availability of police escorts, etc., as shown in the charts, given by the learned Public Prosecutor in pursuance of the directions of this Court.

(5) The jail authorities, who are also very much concerned in the matter of keeping the prisoners in cellular confinement, should not keep any person without orders of remand from the concerned Judicial Magistrates even for a moment beyond the period of detention already ordered, because, if the jail staff keep any person inside the prison, without proper orders of the court, such keeping would be tantamounts to an illegal detention."

12. The fact in the present case is different from the decision

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relied upon by the petitioner's counsel. In this case, the accused were arrested for serious crime and a report was filed on 16.5.2005 before the learned Judicial Magistrate No.II, Poonamallee, and was taken on file in P.R.C.No.40 of 2005 on 20.7.2005. Subsequently, the case was committed to the District and Sessions Court, Thiruvallur in so far as 10 out of 33 persons, who were involved in grave crimes of dacoity and injuries to persons. As far as the accused in the present case are concerned, the case is pending on the file of the District and Sessions Judge, Thiruvallur as Sessions Case No.11 of 2007(S.C.No.11 of 2007). In due course the case was listed for hearing on 16.3.2007 for appearance of accused, due to administrative difficulties as explained above, the accused could not be produced before the concerned Court. However, based on the proceedings issued by the Chief Judicial Magistrate, the Judicial Magistrate, Vellore, extended the order of remand to 30.3.2007. On 30.3.2007 and on subsequent dates, the accused were produced before the Sessions Court periodically and the orders of remand was extended as per report. On the date of hearing of the Habeas Corpus Petition, the accused were in judicial custody under valid orders of remand. The factual situation in Paramasiva's case and Elumalai's case will not applicable to the facts of the present case. In Paramasiva's case, the Court found that the initial order of remand and subsequent order extending the remand was illegal and without jurisdiction. The Division Bench specifically held that the said Court passed successive orders of remand which was without jurisdiction and there was infirmity even at the time of initial remand. In that case, the original order of remand and the further extension were found to be illegal which is not the case in this Habeas Corpus Petition. It is in this factual background, the Apex Court confirmed the order of the Division Bench of this Court as has been set out above. It was a case of a Court which had no jurisdiction passing orders extending the remand from time to time. Prejudice to the accused was manifest in the said case. In Elumalai's case it is mechanical extension of remand in terms of Section 167(2) in many cases without producing the accused before the Magistrate. It is also a case primarily dealing with arrest of persons under Section 41(1) and Section 151(1). In the present case, the breach if any is only on 16.3.2007 and the order of extension of remand is relatable to Section 309 of the Criminal Procedure Code and it is a case on trial. Therefore, the petitioner's plea to invoke the extraordinary jurisdiction of this Court by way of writ of habeas corpus has to be judged from the events on and after 16.3.2007 and also at the time of hearing of the Habeas Corpus Petition.

13. In AIR 1988 Patna 199 FB (RAMESH KUMAR RAVI @ RAM PRASAD AND ETC., v. STATE OF BIHAR AND OTHERS), a Full Bench of Patna High Court, while considering a plea of defective or illegal order of remand, framed the following questions for consideration:-

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(i) Whether a Magistrate has no jurisdiction to pass an order of remand unless an application or a request to that effect is made by the Police or the prosecution?

(ii) Whether the physical production of the accused before the Magistrate for the purpose of remand is so mandatory that a failure to do so would vitiate the same even if the circumstances for non-production were beyond the control of the prosecution and the Police?

(iii) Whether a defect or illegality in the order of a remand of an accused person is incurable and he can claim a writ of habeas corpus despite the fact that on the date of hearing he is in custody under a valid order of remand ?

(iv) Whether the judicial orders of a Criminal Court (stricto sensu) under the Code of Criminal Procedure, are amenable to quashing by a writ of certiorari ?"

14. While dealing with question No.(ii), the Full Bench observed :-

> "14. However, whilst holding so one cannot possibly go to the other extreme and accept the doctrinaire stand that the absence of the physical production of an accused person would vitiate the order of remand incurably. If it is physically impossible to produce the accused in person then his mere non-production would not render his remand to further custody illegal. The wholesome provisions of the Code requiring physical production have to be viewed reasonably and not to an impossibly logical extreme. One example which inevitably comes to one's mind is where the accused person himself may be not in a position to be produced before the Magistrate - he may be mortally injured or grievously ill and lying in hospital. The law would not and cannot possibly require that he must nevertheless be produced in person before the Magistrate even to his detriment and danger to his very life. Cases are not lacking where an accused person charged with many offences may have to be produced on a particular date in two different courts at two different places. It is obvious that by no magic can he be physically produced at both the places at the same time. There may be many other factors which may hinder or even bar the actual physical production of the accused. In the somewhat turbulent times through which we are

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passing a patent one is where a curfew is imposed and the accused person cannot possibly be carried to the venue of the Magistrate's Court without infracting the law Examples of this nature can be multiplied and infinitum and it is somewhat unnecessary to labour the obvious."

(Emphasis added)

Answering to Question No.(iii), the Full Bench observed:-

"24. To sum up on question No.(iii), the answer thereto is rendered in the negative. It is held that the true test for the legality or otherwise of the detention is on the date of the hearing itself. A defect in an earlier order of remand of an accused person is not incurable and he cannot claim a writ of habeas corpus on that score alone if on the date of hearing he is in custody under a valid order of remand."

(Emphasis added)

15. The said view of the Patna High Court was subsequently endorsed by a Full Bench of Andhra Pradesh High Court in the decision reported in 1992 CRL.L.J. 3485 FB (KURRA DASARATHA RAMAIAH AND OTHERS v. STATE OF ANDHRA PRADESH).

16. The Full Bench decision of the Patna High Court was again followed by a Division Bench of this Court in the decision reported in 1993 L.W (Crl.) 392 (T. MOHAN v. STATE OF INSPECTOR OF POLICE, C.B.C.I.D., MADRAS).

17. The Division Bench of this Court in T.Mohan's case, even though found that the order of the Magistrate extending the remand was illegal and unsustainable held that on subsequent dates the accused were produced before the competent court and the remand was extended. On the date of hearing of the Habeas Corpus Petition the Court held there was a valid order extending the order of remand and dismissed the petition. The procedural infirmity was condoned as curable.

18. It is well settled that, while hearing a Writ of Habeas Corpus, the test would be whether there is any illegality or infirmity in the detention on the date of hearing. In the above context, the Supreme Court in the decision reported in AIR 1971 SC 62 (TALIB HUSSAIN - v. - STATE OF JAMMU AND KASHMIR) has held as follows :-

"...that in habeas corpus proceedings the Court has to consider the legality of the detention on the date of hearing. If on the date

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of hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, a writ of habeas corpus cannot issue."

19. The aforesaid view of the Supreme Court is reiterated in the decision reported in AIR 1971 SC 2197 (COL.Dr.B. RAMACHANDRA RAO v. THE STATE OF ORISSA).

20. The very purpose of extension of remand is to ensure that personal liberty of the accused is not trampled. In Elumalai's case, it is a case of mechanical extension of remand periodically. This proposition will not be applicable to the facts of the present case. In any event, as per the report filed, when the Habeas Corpus Petition was heard by this Court the accused were in judicial custody and under valid orders of remand passed by the Court of competent jurisdiction. The reason for production of the accused on 16.3.2007 before the Judicial Magistrate, Vellore, as per the proceedings of the Chief Judicial Magistrate, is explained in the wireless message of the Superintendent, Central Prison, Vellore and in the report dated 13.9.2007. Therefore, permission was sought for by the Jail Superintendent and the Chief Judicial Magistrate nominated a Judicial Magistrate to take up the matters relating to remand of the accused. The report now furnished reveals that the accused were subsequently produced before the proper Court and on the date of hearing of the Habeas Corpus Petition they were in custody under a valid order of remand. Considering the exigencies of the State, provision has been made to ensure that the accused are produced before a Magistrate and thereby their rights are protected. [See 1983 LW Crl.71 (Mrs. Bartley vs. State)]. In the present case, on 16.3.2007, the date on which the breach is alleged by the accused, they were produced before a Magistrate Court though not the competent Court, which Court authorised the extension of the order of remand. Even in the case of non-production before the Magistrate, if it is found justified, the order extending remand was held valid and curable.

21. In view of the decisions reported in AIR 1971 SC 62 and AIR 1971 SC 2197 (cited supra) and considering the views expressed by the Division Bench of this Court in 1993 L.W. (Crl.) 392 (T.Mohan – vs. – State of Inspector of Police, C.B.C.I.D., MADRAS, following the Full Bench decisions of Patna High Court and Full Bench of Andhra Pradesh High Court, we hold that non-production of the accused before the concerned Court on 16.3.2007 as explained by the authorities is curable. The accused were thereafter produced before the competent court and remand was extended from time to time and the same is set out in the report filed. At the time of hearing of the Habeas Corpus Petition and thereafter the accused are in custody under valid orders of remand, there is no illegality in the detention as alleged.

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22. In the light of the above factual position, we find no reason to grant the relief as prayed for. The Habeas Corpus Petition is dismissed. It goes without saying that notwithstanding the dismissal of this H.C.P., it would be always open to the trial Court to consider any application for bail in accordance with law.

P.K. MISRA, J.

I agree.

Even though we have not accepted the contention of the learned counsel for the petitioner, I feel it necessary to place on record my anguish for the cavalier manner in which such important matters regarding production of remand prisoners is being treated by the concerned officials. The practice of producing prisoners before Magistrates or Courts otherwise having no jurisdiction practically serves no purpose so far as the remand prisoners are concerned though technically it may serve the purpose of the State in as much as the requirement in law regarding the production of the prisoners is complied with. There is no doubt that because of many unforeseen situations, at times, it may become well nigh impossible for the police to make adequate security arrangement for accompanying remand prisoners. Utmost care is required to be taken in order to avoid such a situation. It is high time for the authorities concerned to think of specifically earmarking sufficient number of security personnel exclusively for the purpose of accompanying the remand prisoners so that such pernicious practice can be avoided to the maximum extent possible.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Superintendent
   of Central Prison, Vellore.

2. The Superintendent of Central Prison,
   Puzhal, Chennai.

3. The Inspector of Police,
   Vellavedu Police Station,
   Chennai.

4.The Public Prosecutor,
High Court, Madras.

LA (CO)
km/5.10.

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